No. 83-1681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CLINTON P. CARON,
Petitioner,

v.

BANGOR PUBLISHING COMPANY,
Respondent.

On Petition for a Writ of Certiorari To the Supreme Judicial Court of Maine

RESPONDENT'S BRIEF IN OPPOSITION

* ARTHUR B. HANSON
ARTHUR D. MCKEY
HANSON, O'BRIEN, BIRNEY & BUTLER
888 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 298-6161

BERNARD J. KUBETZ
EATON, PEABODY, BRADFORD & VEAGUE
Merrill Center—Exchange Street
Bangor, Maine 04401
(207) 947-0111

Counsel for Respondent

* *Counsel of Record*

QUESTION PRESENTED

WHETHER THIS COURT SHOULD REVIEW THE HOLDING OF THE SUPREME JUDICIAL COURT OF MAINE THAT THE ARTICLE IN QUESTION CONSTITUTED AN EXPRESSION OF OPINION BASED ON NON-DEFAMATORY STATED FACTS AND WAS THEREFORE PRIVILEGED AS A MATTER OF STATE LAW.

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* In accordance with Supreme Court Rule 28.1, please be advised that the parties appearing below were the Bangor Publishing Company and Clinton P. Caron.

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OPINION BELOW

The opinion of the Supreme Judicial Court of Maine, issued January 17, 1984, is set forth at pages 20-32 of the Petition for Certiorari. The opinion is published in the Atlantic Reporter at 470 A.2d 782 (Me. 1984).

COUNTERSTATEMENT OF THE CASE

On August 28, 1982, the Bangor Publishing Company published an editorial in the Bangor Daily News entitled "Obesity in the Ranks." The editorial set forth the writer's opinion that "physical conditioning is, or should be, a condition of employment for those responsible for public safety and law and order." To illustrate this point, the editorial makes reference to an Associated Press photograph, published several days earlier in the Bangor Daily News, which depicts an obviously

overweight police officer at a Waterville, Maine crime scene. The police officer was not identified by name in either the editorial or in the caption to the photograph, although the editorial and caption disclosed that the person described was a member of the Waterville, Maine Police Department.

Clinton P. Caron then brought a libel suit, alleging that he was the police sergeant referred to in the editorial, and sought $3.3 million in compensatory and punitive damages. The Bangor Publishing Company responded to the Complaint by raising four affirmative defenses: the statements complained of are protected under the First Amendment of the United States Constitution and Article 1, Section 4 of the Maine Constitution; the editorial represents a protected statement of opinion under those same state and federal constitutional provisions; Clinton Caron, as a public official, cannot sustain his burden of proving actual malice; and the statements complained of were, in fact, true and therefore protected under 14 M.R.S.A. § 152.

Mr. Caron's Complaint was filed on December 7, 1982. Bangor Publishing Company filed its Motion for Summary Judgment on May 19, 1983. The Motion was scheduled for hearing on June 24, 1983, roughly six and one-half months after the Complaint was filed. During that six and one-half month period, the Bangor Publishing Company filed interrogatories and took the depositions of Plaintiff and the Chief of Police of the Waterville Police Department. Four days before the hearing Mr. Caron noticed the deposition of Mr. Reynolds, the editorial author, for mid-July, 1983. At no time did Mr. Caron move to continue the summary judgment hearing. At the June 24, 1983 hearing Mr. Caron's counsel orally suggested, for the first time, that the hearing should be delayed so that depositions could first be taken of the editorial writer and publisher to probe into their respective states of mind in connection with the editorial.

The Motion for Summary Judgment was granted, the trial court ruling that the editorial represented a non-actionable statement of opinion. The Maine Supreme Judicial Court affirmed, holding the editorial to be a protected expression of opinion based on disclosed non-defamatory facts.

REASONS FOR DENYING THE WRIT

THE SUPREME JUDICIAL COURT OF MAINE CORRECTLY HELD THAT THE ARTICLE IN QUESTION CONSTITUTED AN EXPRESSION OF OPINION BASED ON NON-DEFAMATORY DISCLOSED FACTS AND WAS THEREFORE PRIVILEGED AS A MATTER OF STATE LAW.

In affirming the Summary Judgment below, the Supreme Judicial Court of Maine exercised its jurisdiction to resolve an important question of first impression in the State of Maine. The court correctly concluded that expressions of opinion based upon disclosed non-defamatory facts are privileged as a matter of law. In reaching this decision the court reviewed the extensive common law history of the opinion privilege as manifested in the decisions of other state courts and the Restatement (Second) of Torts. The court below similarly recognized the constitutional implications inherent in protecting expressions of opinion as discussed in prior cases decided by this Court.

This Court has observed that its primary concern in public official libel cases is the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks . . ." *New York Times Co. v. Sullivan*, 376 U.S. 264, 270. Recognition of the fact that effective discussion about the operations of government may consist of severe, sarcastic and satirical criticism of public servants requires that trial courts weigh very carefully what is libelous and what is not. These principles were recently reaffirmed in *Bose Corp. v. Consumer Union of the United States*, 52 U.S.L.W. 4513 (U.S. April 30, 1984). The " 'requirements for actionable libel are strict in the interests of protecting freedom of expression' ". *Byars v. Kolodzicj*, 363 N.E. 2d 628, 630 (Ill. App. Ct. 1977) (citation omitted).

Thus, in public official or public figure libel cases, "before the test of reckless or knowing falsity can be met, there must be a false statement of fact." *National Association of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974).

The expression of pure opinion—that is, an "assertion that cannot be proved false . . . cannot be held libelous." *Hotchner v. Castillo-Puche,* 551 F.2d 910, 913 (2nd Cir. 1977). Similarly, the use of "loose language or undefined slogans that are part of conventional give-and-take in our economic and political controversies . . . is not to falsify facts." *Cafeteria Employees Local 302 v. Angelos,* 320 U.S. 293, 295 (1943), quoted in *National Association of Letter Carriers v. Austin,* 418 U.S. 264, 284 (1974).

While the distinction between a statement of fact and an expression of opinion is often blurred, *see, e.g., Buckley v. Littell,* 539 F.2d 882, 893-95 (2nd Cir.), *cert. denied,* 429 U.S. 1062 (1977), several factors demonstrate that the statement at issue was one of opinion.

The material published was prominently identified as an editorial. The editorial was "written from a subjective, rather obvious, point of view and did not purport to be anything else." *Rinaldi v. Holt, Rinehard & Winston, Inc. 2* Med. L.Rptr. 2169, 2175 (N.Y. Ct. App. 1977). It took a strong editorial opinion on a significant local issue.[1]

The editorial in this case expressed the writer's view that "physical conditioning is, or should be, a condition of employment for those responsible for public safety and law and order."

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[1] Numerous Courts have given wide berth to the use of critical commentary on public figures and public officials. Cases have held nonactionable the words "blackmail", *Greenbelt Cooperative Publishing Ass'n, v. Bressler,* 398 U.S. 6 (1970); "traitor", *National Ass'n of Letter Carriers v. Austin,* 418 U.S. 264 (1974); "bastard", *Curtis Publishing Co. v. Birdsong,* 360 F.2d 344 (5th Cir. 1966); "destroyed", *Times v. Johnston,* 448 F.2d 378 (4th Cir. 1971); "liar", *Wade v. Sterling Gazette Co.,* 56 Ill. App. 2d 101 (3rd District, 1965); "dishonorable and deluded", *Delis v. Sepis,* 9 Ill. App. 3d 317 (Ill. App. 1972); "nut" and "screwball", *Skolnick v. Nudelman,* 95 Ill. App. 2d 293, 237 N.E. 2d 804 (Ill. App. 1968); "completely loses his cool, turns purple ***Prussian dictator", *Vola Solbrig v. Licata,* 15 Ill. App. 3d 1025, 305 N.E. 2d 252 (Ill. App. 1973); "deceptive individual", *Craig v. Moore,* 4 Med. L. Rptr. 1402 (Fla. Cir. Ct. 1978); "fascist", *Buckley v. Littell,* 539 F.2d 882 (2d Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977); "lousy agent", *Valentine v. North American Co. For Life and Health Insurance,* 16 Ill. App. 3d 277, 305 N.E.2d 746, *aff'd,* 60 Ill.2d 168, 328 N.E. 2d 265 (1973); and "manipulator" and "exploiter", *Hotchner v. Castillo-Pusche,* 551 F.2d 910 (2d Cir. 1977).

The author specifically references his opinion by pointing to the recent Associated Press photograph of a Waterville murder scene which depicts an overweight police officer, now known to be the Petitioner, Clinton P. Caron. The editorial writer referred to the policeman as "appearing in all his rotundity in an Associated Press photo" and as making "Jackie Gleason look diminutive." An officer's physique, according to the writer, is likely to inhibit his ability to engage in a foot race with a fleeing felon "who is invariably nimble of foot and as lean as Bill Rogers." Although this policeman, identified by reference to the photo and his status as a sergeant in the Waterville Police Department, may be "dedicated, knowledgeable and loved," the author opines that "he carries too much mass to be either an effective cop on the beat or a tribute to his uniform."

All of these challenged statements must be viewed as the writer's convictions concerning a topic of legitimate public concern—physically unfit policemen. Indeed, how could such a characterization be proven true or false and how could a newspaper's readership, or for that matter the courts, agree on what evidence would support or refute such a contention. The author admittedly used colorful metaphors, hyperbole and overstatement in pointing out the undisputed truthful fact that the officer was overweight. The writer resorts, however, to a dignified tone in expressing his opinion that the police officer's mass prevents him from being optimally effective. A reading of the editorial compels the recognition that the author was not purporting to factually analyze this policeman's job qualifications other than to express an opinion, based solely on the photographic depiction.

All references to Petitioner in the editorial constitute expressions of opinion, rather than statements of fact, concerning his fitness for public office. Such opinions, as a matter of law, cannot be said to be libelous, and were properly disposed of on summary judgment.

The Supreme Judicial Court of Maine correctly recognized in its holding that:

> Because the editorial is an expression of opinion based on disclosed nondefamatory facts, and cannot

> reasonably be construed to imply undisclosed defamatory facts, the Superior Court properly granted the defendants Motion for Summary Judgment.

Petition for Cert. at 32.

In reaching this conclusion, the court exercised its jurisdiction to resolve an important legal issue of first impression in the State of Maine. In holding that expressions of opinion based on disclosed truthful facts do not give rise to liability, the court looked to persuasive authority from other state courts and to the Restatement (Second) of Torts.[2]

Additionally, the Supreme Judicial Court of Maine reviewed the relevant decisions by this Court concerning protections for statements of opinion in libel cases. *National Association of Letter Carriers* v. *Austin*, 418 U.S. 264 (1974); *Greenbelt Cooperative Publishing Association* v. *Bressler*, 398 U.S. 6 (1970); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *accord Bose Corp.* v. *Consumer Union of the United States*, 52 U.S.L.W. at 4518. The holding of the court below is entirely consistent with the prior holdings and expressions in

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[2] The court below held as follows: "The determination whether an allegedly defamatory statement is a statement of fact or opinion is a question of law. *See Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 131 Cal. Rptr. 641, 552 P.2d 425 (1976); *Pease v. Telegraph Publishing Co.*, 121 N.H. 62, 426 A.2d 463 (1981); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 397 N.Y.S. 2d 943, 42 N.Y. 2d 369, 366 N.E. 2d 1299 (N.Y. Ct. App. 1977), *cert. denied*, 434 U.S. 969 (1977); *Cole v. Westinghouse Broadcasting Co.*, 386 Mass. 303, 435 N.E. 2d 1021 (1982). If the average reader could reasonably understand the statement as either fact or opinion, the question of which it is will be submitted to the jury. *E.g., Good Government Group v. Superior Court*, 22 Cal. 3d 672, 150 Cal. Rptr. 258, 586 P.2d 572 (1978), *cert. denied*, 441 U.S. 961 (1979); *Pease v. Telegraph Publishing Co., supra; Myers v. Boston Magazine Co.*, 380 Mass. 336, 403 N.E. 2d 376 (1980). If, however, the court concludes that the average reader could not reasonably understand the statement as anything other than opinion, no genuine issue of material fact exists and summary judgment for the defendant in the libel action may be entered. Such is the situation here.

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A statement, ostensibly in the form of an opinion, gives rise to liability if it implies the allegation of undisclosed defamatory facts as the basis of the opinion. See Restatement (Second) of Torts § 566 (1977).

dicta in the cases cited above. In turn, the views of this Court with respect to the constitutional protections for statements of opinion are fully consistent with, and are based on the extensive common law tradition of protection for statements of opinion.[3]

Finally, Petitioner complains that he should have been allowed to depose the publisher in an effort to establish actual malice. This argument is without merit for two reasons. First, when a publication is privileged, as is the one in question, the issue of actual malice need never be reached. Second, the record reflects that the Petitioner had six and one-half months to conduct depositions yet failed to do so. The Petitioner was dilatorious and cannot now complain that he was denied his right to discovery.

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[3] See R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 153-85 (1980)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARTHUR B. HANSON
ARTHUR D. MCKEY
HANSON, O'BRIEN, BIRNEY & BUTLER
888 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 298-6161

BERNARD K. KUBETZ
EATON, PEABODY, BRADFORD
& VEAGUE
Merrill Center—Exchange Street
Bangor, Maine 04401
(207) 947-0111